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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

SUNEARTH, INC., ET AL.,)	
)	
)	
PLAINTIFFS,)	NO. C-11-4991 CW
)	
VS.)	THURSDAY, JUNE 7, 2012
)	
SUN EARTH SOLAR POWER CO.)	OAKLAND, CALIFORNIA
LIMITED, ET AL.,)	
)	
DEFENDANTS.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: HAYS-SOLOWAY
4640 E. SKYLINE DRIVE
TUCSON, ARIZONA 85718
BY: STEPHEN B. MOSIER, ESQUIRE

SEQUOIA COUNSEL PC
770 L STREET, SUITE 950
SACRAMENTO, CALIFORNIA 95814
BY: DANIEL N. BALLARD, ESQUIRE

FOR DEFENDANTS: WOLF, GREENFIELD & SACKS, P.C.
600 ATLANTIC AVENUE
BOSTON, MASSACHUSETTS 02210
BY: JAMES J. FOSTER, ESQUIRE

REPORTED BY: DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

1 THURSDAY, JUNE 7, 2012

2:54 P.M.

2 P R O C E E D I N G S

3 **THE CLERK:** CALLING C-11-4991 SUNEARTH, INC. ET AL.
4 VERSUS SUN EARTH SOLAR POWER COMPANY, LIMITED, ET AL.

5 PLEASE STEP FORWARD AND STATE YOUR APPEARANCES FOR
6 THE RECORD, PLEASE.

7 **MR. BALLARD:** DAN BALLARD FOR PLAINTIFF SUNEARTH.

8 **MR. MOSIER:** GOOD AFTERNOON, YOUR HONOR. STEVE
9 MOSIER FOR PLAINTIFF SUNEARTH, INC. AND THE SOLARAY
10 CORPORATION.

11 **MR. FOSTER:** GOOD AFTERNOON, YOUR HONOR. JAMES
12 FOSTER FOR DEFENDANTS.

13 **THE COURT:** GOOD AFTERNOON.

14 SO THIS IS ON FOR PLAINTIFFS' MOTION TO HOLD
15 DEFENDANTS IN CIVIL CONTEMPT AND ALSO PLAINTIFFS' MOTION, I
16 GUESS, TO STRIKE AFFIRMATIVE DEFENSES AND DEFENDANTS' REQUEST
17 TO HAVE A PRETRIAL CONFERENCE.

18 ON THE CONTEMPT ISSUE, IT DOES SEEM THAT AT LEAST IN
19 SOME WAYS THAT THE COURT'S ORDERS WERE VIOLATED. THE WEBSITES,
20 FOR WHATEVER REASONS, DIDN'T DO WHAT THEY WERE SUPPOSED TO DO.
21 IT DOES APPEAR THAT THEY HAVE BEEN FIXED.

22 I DON'T THINK THAT THERE'S ANY SHOWING DAMAGES WITH
23 THE EXCEPTION OF PERHAPS ATTORNEYS' FEES. I DON'T KNOW THAT
24 THERE'S ANY COERCIVE SANCTION THAT COULD BE IMPOSED AT THIS
25 POINT. ONE CAN'T IMPOSE A DAMAGES SANCTION FOR PAST CONDUCT.

1 THAT WOULD BE CRIMINAL CONTEMPT, SO ONE COULD ONLY IMPOSE THE
2 COERCIVE SANCTION FOR FUTURE CONDUCT. I SUPPOSE WE COULD TALK
3 ABOUT THAT.

4 THE MAGAZINE ISSUE, I THINK THAT A MAGAZINE THAT
5 ONE-FOURTH OF THE SUBSCRIPTIONS GO TO THE U.S. IS ADVERTISING
6 IN THE U.S. SO, IT SEEMS TO ME THAT THE DEFENDANT NEEDED TO
7 EXPLORE WITH THE MAGAZINE WHETHER IT CAN DO SPECIAL VERSIONS AS
8 MAGAZINES AND NEWSPAPERS OFTEN DO THAT ARE AIMED AT CERTAIN
9 AUDIENCES. AND IF THEY CAN'T, WELL THEN THAT JUST MAY BE TOO
10 BAD, THEY CAN'T USE THAT MAGAZINE.

11 **MR. FOSTER:** YOUR HONOR, I HAD A SUGGESTION IN THE
12 PAPERS. IF THEY CANNOT DO SPECIAL VERSIONS, CAN WE PUT THE
13 DISCLAIMER IN THE MAGAZINE THAT IN THE UNITED STATES IT'S NB
14 SOLAR, THE SAME THING THAT YOUR HONOR ORDERED FOR THE WEBSITE?

15 **THE COURT:** NO. I MEAN, I AM NOT GOING TO SAY THAT
16 IN THE COURSE OF THIS PROCEEDING.

17 **MR. FOSTER:** ALL RIGHT.

18 **THE COURT:** AND I AM CONCERNED ABOUT THE ALLEGATIONS
19 THAT THESE THINGS WERE -- THIS IS PART OF WHAT I DO THINK IS
20 VIOLATION OF THE COURT'S ORDER, THE FACT THAT THESE
21 ADVERTISEMENTS OCCURRED IN, WAS IT WHAT, FEBRUARY AND MARCH,
22 AND THE DEFENDANT SAID, OH, BUT WE BOUGHT THESE LAST DECEMBER.

23 WELL, MAYBE SO, BUT THEY DON'T SAY AND THEN WE WENT
24 TO THEM AND TRIED TO GET THEM PULLED AND WE WERE TOLD IT WAS
25 TOO LATE TO PULL THEM. AND WE OFFERED TO PAY LARGE SUMS OF

1 MONEY AND THEY STILL SAID, NO, WE CAN'T PULL THEM. THEN THEY
2 END UP IN THERE AGAIN IN APRIL WITH NO EXPLANATION -- THAT CAME
3 UP IN THE REPLY, BUT I HAVEN'T HEARD ANY EXPLANATION OF HOW
4 THEY ENDED UP IN THERE IN APRIL AGAIN.

5 **MR. FOSTER:** I THINK IT'S JUST THEY ALL REGARD THIS
6 AS EUROPEAN ADVERTISING BECAUSE THEY DIDN'T ADVERTISE IN THE
7 UNITED STATES PUBLICATION. AND WHEN THIS ISSUE WAS RAISED IN
8 THE PAPERS BY THE PLAINTIFFS, THEN WE BROUGHT IT TO THE COURT'S
9 ATTENTION TO CLARIFY THIS, WHETHER WE CAN DO THIS OR NOT
10 BECAUSE IT'S PRIMARILY EUROPEAN.

11 I UNDERSTAND YOUR HONOR SAYS NOW THAT YOU DON'T WANT
12 US TO DO THAT UNLESS WE CAN GET A SPECIAL EDITION, AND WE WILL
13 TAKE IT UP WITH THE MAGAZINE.

14 **THE COURT:** OKAY.

15 AGAIN, THERE DON'T SEEM TO BE ANY DAMAGES THAT ONE
16 COULD AWARD OTHER THAN POSSIBLY ATTORNEYS' FEES. THERE DON'T
17 SEEM -- I MEAN, I GUESS I COULD AWARD A COERCIVE SANCTION EVERY
18 TIME IT APPEARS IN THERE AGAIN IT'S \$5,000 OR WHATEVER --

19 **MR. FOSTER:** IT WON'T. IT WON'T.

20 **THE COURT:** OKAY.

21 THE REPORT IS INADEQUATE. IT NEEDS TO HAVE MORE IN
22 IT.

23 **MR. FOSTER:** I AM HAPPY TO DO THAT, YOUR HONOR. WE
24 DID LIST EVERYTHING WE DID. THAT'S WHY I WAS A LITTLE BIT
25 PUZZLED --

1 **THE COURT:** I THINK THE QUESTIONS THAT YOU WERE
2 ASKED WERE WELL-TAKEN.

3 **MR. FOSTER:** ALL RIGHT.

4 **THE COURT:** AND THEY SHOULD HAVE BEEN ANSWERED. AND
5 ONE COULD GO DOWN THE ORDER OF WHAT ONE WAS TOLD TO DO AND SAY,
6 LINE 1 SAID WE SHOULD DO THIS, AND HERE'S WHAT WE DID. LINE 2
7 SAID WE SHOULD DO THAT, AND HERE'S WHAT WE DID; NOT A SORT OF
8 CONCLUSORY THING THAT, OH, WE DID EVERYTHING WE WERE SUPPOSED
9 TO. WELL, HOW DO WE KNOW THAT YOU'RE INTERPRETING WHAT YOU'RE
10 SUPPOSED TO IN THE SAME WAY THAT WE ARE IF YOU DON'T ADDRESS
11 EACH ITEM AND SAY THIS TELLS US TO DO THIS, BUT WE NEVER WERE
12 DOING OTHERWISE, SO WE CONTINUED TO DO WHAT WE HAVE ALWAYS
13 DONE, WHICH WAS X, Y AND Z. JUST A MORE COMPLETE --

14 **MR. FOSTER:** UNDERSTOOD. WE CAN CLARIFY.

15 **THE COURT:** -- STATEMENT AND NOT A SORT OF NEGATIVE
16 PREGNANT STATEMENT, WHERE YOU DON'T REALLY KNOW WHETHER YOU'RE
17 SAYING -- MAKING REPRESENTATION OR NOT MAKING REPRESENTATION
18 BECAUSE YOU DON'T ADDRESS IT ONE WAY OR THE OTHER.

19 **MR. FOSTER:** UNDERSTOOD.

20 **THE COURT:** ONE COULD USE SUCH A METHODOLOGY TO
21 EVADE ANSWERING. AND I AM NOT SAYING YOU WERE, BUT ONE COULD.

22 **MR. FOSTER:** OKAY.

23 **THE COURT:** SO, I DON'T KNOW IF WE HAVE ANY OTHER
24 POINTS.

25 I MEAN, I GUESS IF YOU WANT TO PICK A NUMBER OF WHAT

1 COERCIVE SANCTION WOULD BE APPLIED IF -- DO WE NEED ANOTHER
2 REPORT? OR WHAT ARE YOU SEEING IN THE FUTURE AS SOME SORT OF
3 COERCIVE SANCTION THAT YOU WANT? IF YOU DON'T DO "X", YOU PAY
4 A THOUSAND DOLLARS A DAY, OR WHATEVER.

5 **MR. MOSIER:** YOUR HONOR, THAT, FRANKLY, IS NOT
6 IMPORTANT TO US.

7 WE DO BELIEVE THAT WE DO NEED A FULLY COMPLIANT
8 COMPLIANCE REPORT. WE THINK THAT WOULD BE EXTREMELY HELPFUL.

9 IF THERE ARE, YOU KNOW, POINTS OF WHAT WE PERCEIVE
10 TO BE AMBIGUITY IN THE COMPLIANCE REPORT, WE WOULD ASK THAT
11 THEY BE ADDRESSED.

12 THE POINT OF THE COMPLIANCE REPORT WAS TO HAVE A
13 CATEGORICAL STATEMENT UNDER OATH, SWORN STATEMENT FROM THE
14 DEFENDANTS AS TO WHAT THEY DID AND, FRANKLY, IN SOME INSTANCES
15 WHAT THEY DIDN'T DO, AND THAT COMPLIANCE REPORT, WE BELIEVE,
16 SHOULD BE FROM FEBRUARY, I BELIEVE IT WAS THE 19TH, WHICH WAS
17 THE DATE THAT THE PRELIMINARY ORDER WENT INTO EFFECT, AND IT
18 SHOULD COVER THE TIME PERIOD FROM FEBRUARY 19TH UNTIL THE
19 MODIFIED PRELIMINARY INJUNCTION ORDER. AND IT SHOULD STATE
20 WHETHER OR NOT THERE WERE ANY SALES WITHIN THE UNITED STATES
21 DURING THAT TIME PERIOD OF INFRINGING PRODUCT. AND WE THINK
22 THAT THAT'S THE CORE OF THE PURPOSE OF THE COMPLIANCE REPORT,
23 AND TO HAVE SOMEBODY ACTUALLY TAKE RESPONSIBILITY FOR IT.

24 WE DON'T THINK --

25 **THE COURT:** WAS THAT JUST A ONE-SHOT DEAL OR IS IT A

1 REGULAR THING THAT THEY ARE SUPPOSED TO BE DOING?

2 MR. MOSIER: AS IT WAS WRITTEN PURSUANT TO OUR
3 REQUEST, IT WAS A ONE-SHOT DEAL.

4 THE COURT: SO YOU THINK THEY NEED TO DO IT AGAIN?

5 MR. MOSIER: RIGHT. RIGHT.

6 THE COURT: BUT, AGAIN, AS A ONE-SHOT DEAL?

7 MR. FOSTER: WE COULD DO THAT, YOUR HONOR. I MIGHT
8 MENTION THAT MY CLIENT IS BEING DEPOSED NEXT WEEK.

9 MR. MOSIER: RIGHT.

10 MR. FOSTER: YOU COULD TAKE UP THE ISSUES IN THE
11 DEPOSITION TO COVER THAT.

12 MR. MOSIER: WE COULD EXCEPT THE SUBJECTS AND ISSUES
13 DOESN'T REALLY COVER THAT FOR EITHER DEFENDANT.

14 WE CERTAINLY COULD DO THAT AND WE INTEND TO EXPLORE
15 IT, BUT WE STILL THINK IT WOULD BE USEFUL TO HAVE A FULLY
16 COMPLIANT COMPLIANCE REPORT.

17 THE COURT: IT MIGHT BETTER TO DO THE REPORT BEFORE
18 THE DEPOSITION.

19 MR. MOSIER: YES.

20 THE COURT: THEN IF THEY HAD QUESTIONS THAT YOU
21 HADN'T FORESEEN OR ANTICIPATED, THEY COULD BE ASKED ON THE
22 SPOT, WE WOULDN'T BE HAVING A LOT OF BACK AND FORTH ABOUT IT.

23 MR. FOSTER: WE WILL CERTAINLY TRY, ALTHOUGH THE
24 WITNESS IS CURRENTLY FLYING HERE FROM CHINA. BUT WE WILL TRY
25 AND WORK IT OUT OVER THE WEEKEND.

1 **THE COURT:** DO THE BEST YOU CAN. WRITE UP
2 EVERYTHING THAT YOU'RE ABLE TO WRITE UP AND GIVE IT TO HIM
3 BEFORE THE DEPOSITION. AND THINGS YOU DON'T KNOW, JUST SAY I
4 DON'T KNOW FOR SURE YET WHAT WE DID ABOUT THIS LINE, WE WILL
5 HAVE TO LET YOU KNOW LATER, BUT AT LEAST DO A PARTIAL ONE.

6 **MR. FOSTER:** THE WITNESS WAS BEING PREPARED TO
7 ACTUALLY ANSWER ALL THOSE QUESTIONS, MR. MOSIER, BUT WE WILL
8 TAKE YOUR HONOR'S SUGGESTION.

9 **MR. MOSIER:** THAT'S GOOD.

10 **THE COURT:** OKAY.

11 THEN TURNING TO THE PROPOSED AFFIRMATIVE DEFENSE,
12 THE DEFENDANT HAS PROPOSED A DIFFERENT ONE THAN THE ONE THAT
13 YOU FIRST OBJECTED TO. AND YOUR OBJECTION TO THE DIFFERENT ONE
14 IS THAT IT'S -- THE COURT HAD SORT OF SAID THAT THERE WAS A
15 LIKELIHOOD THAT THEY WOULD NOT PREVAIL ON THAT POINT.

16 BUT YOU HAVE TO UNDERSTAND THAT THE PRELIMINARY
17 INJUNCTION ORDER IS JUST THAT, IT'S NOT A SUMMARY JUDGMENT
18 ORDER, IT'S A PRELIMINARY INJUNCTION ORDER, WHICH SAYS NOT
19 LIKELY TO PREVAIL.

20 NOW THAT MIGHT BE DISCOURAGING, BUT IT DOESN'T MEAN
21 THAT IT'S NOT -- HE CAN'T STATE A CLAIM AND IT DOESN'T MEAN HE
22 CAN'T CONCEIVABLY WIN ON IT IF THINGS GO DIFFERENTLY. ON THE
23 OTHER HAND, I DON'T KNOW IF ANY OF THE POINTS THEY MADE MIGHT
24 LEAD YOU TO THINK YOU SHOULD MODIFY THE PROPOSED AMENDED
25 INJUNCTION. I WILL LET YOU FILE THE ONE YOU'VE SUBMITTED, IF

1 YOU WANT TO. OR, IF YOU WOULD LIKE TO BEEF IT UP OR CHANGE IT
2 IN SOME WAY AND FILE A DIFFERENT OR BETTER ONE IN A WEEK, YOU
3 CAN DO THAT INSTEAD.

4 **MR. FOSTER:** WE WILL TAKE A LOOK, YOUR HONOR, AND
5 DECIDE AS YOU REQUESTED US TO DO.

6 **THE COURT:** OKAY.

7 AND THEN IN TERMS OF ASKING FOR A PRETRIAL
8 CONFERENCE, WHAT WE ARE REALLY TALKING ABOUT HERE IS WHY CAN'T
9 THIS CASE BEING SETTLED.

10 I DON'T NEED AN INVITATION TO ASK THE PARTIES AT ANY
11 TIME WHY THE CASE CAN'T BE SETTLED. SO I WILL ASK YOU NOW, WHY
12 THE CASE CAN'T BE SETTLED.

13 IT SEEMS TO ME THAT THE DEFENDANT IS SAYING WE ARE
14 BASICALLY WILLING TO GIVE YOU EVERYTHING WE THOUGHT YOU WANTED,
15 AND YOU JUST WANT MORE MONEY. AND -- BUT THAT HAPPENS. I
16 MEAN, A LOT OF TIMES DEFENDANTS ARE WILLING TO DO WHAT'S ASKED
17 OF THEM, BUT THE PLAINTIFF WANTS MORE MONEY THAN THEY WANT TO
18 PAY.

19 SO YOUR CHOICES ARE TO PAY MORE MONEY OR PERHAPS TO
20 PERSUADE THEM THAT YOU CAN'T PAY MORE MONEY. YOU ARE GOING TO
21 HAVE A PROBLEM GIVEN THE REPRESENTATIONS THAT WERE MADE ABOUT
22 HOW BIG THE COMPANY WAS, BUT IF YOU ARE SAYING WE CAN'T AFFORD
23 TO PAY THE KIND OF MONEY YOU WANT, YOU NEED TO BE IN A POSITION
24 TO PROVE TO THEM THAT THAT'S TRUE. BECAUSE PLAINTIFFS NEVER
25 BELIEVE DEFENDANTS WHEN THEY SAY WE CAN'T PAY AS MUCH AS YOU

1 WANT.

2 OR, THIRDLY, YOU MAY THINK YOU SHOULDN'T HAVE TO PAY
3 AS MUCH AS THEY WANT BECAUSE THEIR CASE ISN'T AS GOOD AS THEY
4 THINK IT IS. IF THAT'S THE CASE, IT'S KIND OF INSOLUBLE AND
5 THEN ALL YOU CAN DO IS PRESS ON IN LITIGATION AND SEE WHO'S
6 RIGHT ABOUT IT.

7 ON THE OTHER HAND, YOU SAY THAT WHAT YOU'VE GOT SO
8 FAR ISN'T WHAT YOU WANT, YOU WANT MORE THAN THAT. I SUPPOSE IF
9 THAT'S TRUE, YOU SHOULD WRITE OUT WHAT IT IS THAT YOU WANT AND
10 SAY HERE'S THE MODIFIED, MODIFIED PERMANENT INJUNCTION THAT WE
11 WOULD WANT IF WE WERE GOING TO SETTLE. AND YOU SHOULD ALSO
12 CONSIDER THE MONEY SITUATION.

13 AND, AGAIN, IF THEY ARE TELLING YOU WE CAN'T AFFORD
14 ANY MORE, THEN MAKE THEM PROVE IT TO YOU. IF YOU JUST THINK
15 THEY AREN'T OFFERING MORE BECAUSE THEY DON'T THINK YOUR CASE IS
16 AS STRONG AS YOU THINK IT IS, THEN YOU NEED TO ASSESS THAT AND
17 SEE IF YOU CAN PERSUADE EACH OTHER THAT IT IS.

18 BUT FAILING THAT, YOU HAVE TO LITIGATE IT.

19 **MR. FOSTER:** WE UNDERSTAND THAT THE COURT'S ALWAYS
20 IN THE POSITION THAT IF THE PARTIES CAN'T REACH AN AGREEMENT,
21 THEY HAVE TO GO AHEAD AND LITIGATE IT.

22 I THINK THE STICKY POINT HERE WAS THAT -- WHAT'S
23 DIFFERENT ABOUT THIS CASE, YOUR HONOR, IS THAT YOU HAVE EXPRESS
24 VIEWS ON ALL OF THE ISSUES SO FAR, AND MANY AGAINST US AND TO A
25 LIMITED EXTENT AGAINST WHAT MR. MOSIER'S -- AND WHAT WE ARE

1 TRYING TO DO IS GET -- SINCE THE COURT IS -- AND IT'S NONJURY.

2 SO THE COURT HAS SET FORTH THE COURT'S VIEWS. WE'RE
3 JUST TRYING TO AVOID SOME WAY OF SPENDING A LOT OF MONEY WITH
4 BOTH SIDES TRYING TO CHANGE WHAT THE COURT'S DECISION IS.
5 THAT'S WHY I SAY, IF THERE'S SOME WAY, EITHER -- IF NOT YOUR
6 HONOR'S SELF, MAGISTRATE JUDGE, SOMEBODY GET THE PARTIES
7 TOGETHER SO WE DON'T SPEND A LOT OF MONEY TRYING TO CHANGE THE
8 LEGAL ISSUES.

9 **THE COURT:** I HAVEN'T SEEN WHAT IT IS THEY THINK
10 THEY CAN DO BETTER ON. SO, I MEAN, I WOULD BE WILLING TO RULE
11 ON IT QUICKLY, IF THAT WOULD HELP.

12 IF YOU WANT TO MAKE SOME PROPOSAL OF WHAT YOU THINK
13 YOU WANT THAT'S BETTER THAN WHAT YOU'VE GOT AND SHOW IT TO THEM
14 AND YOU AGREE TO ANY OF IT THAT YOU CAN AGREE TO IT, SUBMIT IT
15 TO ME IN THE FORM OF A MOTION TO MODIFY THE PRELIMINARY
16 INJUNCTION, I SUPPOSE WE COULD DO IT THAT WAY.

17 **MR. FOSTER:** THAT MAY BE VERY HELPFUL.

18 **THE COURT:** OTHERWISE WE CAN JUST GO TO TRIAL OR YOU
19 CAN SETTLE IT.

20 WHAT HAVE YOU DONE SO FAR TO TRY TO SETTLE IT?

21 **MR. MOSIER:** WE HAD A FULL DAY MEDIATION.

22 MR. AFSHARI --

23 **THE COURT:** WHO IS THAT? I DON'T KNOW THAT PERSON.

24 **MR. MOSIER:** HE'S A VERY FINE LAWYER, VERY
25 KNOWLEDGEABLE IN THE TRADEMARK AREA.

1 **THE COURT:** FROM WHERE? FROM HERE?

2 **MR. BALLARD:** SAN FRANCISCO.

3 **THE COURT:** SO YOU SPENT A DAY WITH HIM AND YOU
4 WEREN'T ABLE TO REACH ANY AGREEMENT ON EITHER WHAT THE TERMS OF
5 THE INJUNCTION SHOULD BE OR ON WHAT THE AMOUNT OF ATTORNEY'S
6 FEES AND SO ON SHOULD BE?

7 **MR. MOSIER:** THAT'S CORRECT, AND WE WERE NOT CLOSE,
8 YOUR HONOR.

9 **THE COURT:** OKAY. WELL, I CAN'T GET INVOLVED IN THE
10 MONEY. I DON'T KNOW WHAT ELSE I CAN SUGGEST.

11 YOU COULD GO BACK TO HIM. IF YOU FEEL LIKE THERE
12 WAS SOMETHING THAT HE DIDN'T KNOW OR THAT HAS CHANGED SINCE, OR
13 MAYBE HE JUST WASN'T -- SOMEONE DIDN'T TRUST HIM OR THINK HIS
14 VIEWS WERE CORRECT, OR MAYBE HE WASN'T DIRECTIVE ENOUGH, IF
15 YOU'D LIKE TO GO TO SOMEBODY ELSE, I WOULD BE HAPPY TO SEND YOU
16 TO SOMEONE ELSE. I COULD SEND YOU TO A MAGISTRATE JUDGE IF YOU
17 THINK THAT WOULD HELP.

18 **MR. FOSTER:** IF I MIGHT, YOUR HONOR.

19 IT'S NOT THE MONEY. I THINK IF IT'S JUST THE MONEY,
20 IF THE PARTIES CAN'T AGREE ON THE MONEY, THE CASE GETS TRIED.
21 I UNDERSTAND THAT. IT'S THE NONMONEY ISSUE.

22 I THINK YOUR HONOR'S SUGGESTION THAT IF THEY WANT TO
23 RAISE THE ISSUE AND YOUR HONOR CAN DEAL WITH IT, I THINK THAT
24 WOULD DO A LOT TO GET THE CASE SETTLED.

25 **THE COURT:** OKAY. DO YOU WANT TO GO TO A MAGISTRATE

1 JUDGE? YOU WANT TO GO BACK TO MR. AFGAR (SIC)?

2 **MR. FOSTER:** THERE'S TWO POSSIBILITIES, YOUR HONOR,
3 AND MR. MOSIER MAY AGREE.

4 FIRST IS TO PICK UP THE SUGGESTION YOUR HONOR MADE
5 THAT THEY COULD FILE A MOTION TO ASK FOR THE RELIEF THAT THEY
6 DIDN'T GET FROM THE COURT.

7 THE OTHER SUGGESTION, WHICH IS NOT MUTUALLY
8 EXCLUSIVE, IS THAT THE MATTER GOES TO ONE OF THE MAGISTRATE
9 JUDGES WHO -- YOUR HONOR WOULD KNOW THE BEST ONES ARE TO SETTLE
10 CASES.

11 **MR. MOSIER:** WE DON'T -- FRANKLY, WE DON'T BELIEVE
12 THAT WE HAVE OCCASION OR REASON TO WANT TO SEEK TO MODIFY THE
13 PRELIMINARY INJUNCTION, THE ONE THAT IS CURRENTLY IN EFFECT.

14 WE BELIEVE THAT THAT ORDER WAS AN ORDER ENTERED IN
15 ORDER TO PRESERVE THE STATUS QUO, ALL FACTORS CONSIDERED, AND
16 WE HAVE NO REASON -- IF WE FRANKLY DISAGREED WITH THAT ORDER TO
17 ACHIEVE THAT PURPOSE, WE, FRANKLY, WOULD HAVE APPEALED IT. WE
18 DIDN'T. WE THINK --

19 **THE COURT:** WHAT DO YOU WANT FOR YOUR FINAL ORDER
20 THEN? WHAT IS IT THAT -- WHAT DO YOU WANT THAT YOU DON'T HAVE
21 BESIDES MORE MONEY?

22 **MR. MOSIER:** WELL, THERE'S FOUR PRINCIPAL FORMS OF
23 RELIEF THAT WE ARE SEEKING. APART FROM THE SPECIFIC TERMS OF
24 THE FINAL PRELIMINARY INJUNCTION ORDER, THERE'S A
25 CYBERSQUATTING CLAIM THAT RELATES TO THE WEBSITES. THAT'S VERY

1 IMPORTANT TO US ULTIMATELY. WE WANT --

2 **THE COURT:** DO YOU WANT MONEY FOR IT OR HAVING SOME
3 CHANGE MADE?

4 **MR. MOSIER:** NO. WE, FRANKLY, WANT THE SUN EARTH
5 WEBSITES TO BE TRANSFERRED TO MY CLIENTS. WE THINK UNDER THESE
6 CIRCUMSTANCES THAT'S ENTIRELY APPROPRIATE, THAT'S PERMISSIBLE,
7 AND A FREQUENT FORM OF REMEDY GRANTED FOR CYBERSQUATTING. WE
8 THINK THAT THAT'S PERFECTLY APPLICABLE HERE FOR A NUMBER OF
9 REASONS.

10 THAT ISSUE IS NOT -- WAS NOT -- HAS NEVER BEEN FULLY
11 BRIEFED, FRANKLY, BUT THAT'S A SIGNIFICANT PART OF THE CASE.

12 **THE COURT:** YOU TALKED ABOUT IT IN THE SETTLEMENT
13 CONFERENCE YOU HAD WITH THIS GENTLEMAN?

14 **MR. MOSIER:** YEAH. AND WE ARE NOWHERE CLOSE ON
15 THAT.

16 ATTORNEYS' FEES IS A SIGNIFICANT ISSUE IN THIS CASE.
17 THE UNJUST ENRICHMENT CLAIM IS A VERY SIGNIFICANT
18 ISSUE IN THIS CASE BASED ON ALL THINGS CONSIDERED, EVERYTHING
19 THAT WE KNOW, AS WE SIT HERE TODAY, THE UNJUST ENRICHMENT CLAIM
20 IS A VERY SIGNIFICANT ISSUE IN THE CASE.

21 **THE COURT:** MEANING YOU WANT MONEY FROM THEM THAT
22 THEY -- YOU WANT DAMAGES, ESSENTIALLY.

23 **MR. MOSIER:** YES.

24 **THE COURT:** YOU WANT DAMAGES, YOU WANT ATTORNEYS'
25 FEES, YOU WANT THEIR WEBSITE, AND YOU WANT SOME UNSPECIFIED

1 CHANGES IN THE PERMANENT INJUNCTION.

2 **MR. MOSIER:** SPECIFICALLY WE WOULD -- WE BELIEVE
3 THAT THE APPROPRIATE REMEDY UNDER THE LANHAM ACT, UNDER THE
4 FACTS AND CIRCUMSTANCES OF THIS CASE, SHOULD INCLUDE
5 DISCONTINUATION OF THE NAME -- OF THE USE OF THE NAME AND MARK
6 BY THE DEFENDANT IN THE UNITED STATES. THAT'S WHAT WE BELIEVE
7 ULTIMATELY.

8 **THE COURT:** IT IS KIND OF IN THERE ALREADY, ISN'T
9 IT?

10 **MR. MOSIER:** THERE IS SOME EXCEPTIONS, BUT TO SOME
11 EXTENT DO -- WELL, UNDER THE TERMS OF THE ORDER, AS MODIFIED
12 PRELIMINARY INJUNCTION ORDER, THERE IS AN EXCEPTION PERMITTING
13 THE USE OF THE TRADE NAME QUOTE "TO THE MINIMUM EXTENT
14 NECESSARY" END QUOTE IN THE ORDINARY COURSE OF BUSINESS. SO --

15 **THE COURT:** I WAS JUST TRYING TO MAKE SURE THEY
16 COULD SEND OUT THEIR BILLS OR THEIR CUSTOMS FORMS.

17 **MR. MOSIER:** WELL, WE BELIEVE THAT --

18 **THE COURT:** THAT'S GOING TO BE A TERMINATING MATTER.
19 EVENTUALLY THEY WON'T HAVE ANY BILLS OR CUSTOMS FORMS IN THAT
20 NAME. BUT TO THE EXTENT THEY SHIP SOMETHING IN THAT NAME AND
21 THEY WON'T BE ABLE TO GET IT THROUGH CUSTOMS UNLESS THEY
22 IDENTIFY IT WITH THAT NAME, IT DIDN'T SEEM APPROPRIATE TO NOT
23 LET THEM DO THAT.

24 **MR. MOSIER:** THAT'S WHY WE, FRANKLY, DIDN'T APPEAL
25 YOUR HONOR'S MODIFIED PRELIMINARY INJUNCTION ORDER. IF THE USE

1 OF THE NAME IN THE UNITED STATES COMES TO AN END, THEN THAT'S
2 WHAT WE ANTICIPATE, FRANKLY. AND IF THAT'S GOING TO HAPPEN,
3 THAT'S FINE.

4 BUT THE TERMINOLOGY IN THE MODIFIED PRELIMINARY
5 INJUNCTION ORDER, TO THE EXTENT THAT IT COULD BE READ AS
6 PERMITTING THE CONTINUED USE OF THE TRADE NAME SUN EARTH INTO
7 THE FUTURE, WE BELIEVE WOULD NOT BE AN APPROPRIATE FINAL
8 INJUNCTION REMEDY EVEN THOUGH IT'S A PERFECTLY APPROPRIATE
9 PRELIMINARY INJUNCTION REMEDY.

10 **THE COURT:** WHY DON'T YOU WRITE UP THE FINAL
11 INJUNCTION YOU THINK YOU OUGHT TO HAVE, HEEDING AS CLOSELY AS
12 YOU CAN TO THE PRELIMINARY INJUNCTION WITH A RED LINE VERSION
13 SO I KNOW WHAT YOU DID DIFFERENTLY, GIVE IT TO THE OPPOSING
14 COUNSEL AND SEE IF THEY'LL AGREE TO ANY OF IT. IF THEY WON'T,
15 SEE HOW FAR APART YOU ARE.

16 AND YOU CAN AT LEAST SUBMIT THAT TO ME WITH SOME
17 BRIEFING, PERHAPS, AND THEN YOU WOULD HAVE ONLY THE PROBLEM OF
18 THE ATTORNEYS' FEES, THE DAMAGES, AND THE WEBSITE.

19 I AM NOT REALLY CLEAR ON WHY YOU WANT THE WEBSITE SO
20 BADLY IF YOU'VE GOT THIS CHOICE THING THAT PEOPLE WILL GO TO
21 YOU, BUT ON THE OTHER HAND, ONCE THAT'S SORT OF PASSED BY IN A
22 YEAR OR SO, I AM NOT SURE WHY YOU WOULD CARE NOT TO HAVE THE
23 SUN EARTH WEBSITE ANY MORE. AFTER A YEAR OF PEOPLE GETTING
24 THEIR CHOICE PAGE, THEY WILL CATCH ON WHAT YOUR NAME IS AND
25 THEY WON'T BE GOING TO THAT CHOICE PAGE ANYMORE, AND THEN YOU

1 WON'T NEED THAT WEBSITE ANYMORE, IN WHICH CASE YOU CAN GIVE IT
2 UP, I SHOULD THINK.

3 **MR. FOSTER:** WE WILL LOOK AT THAT. BUT I THINK WE
4 ARE GETTING CLOSE.

5 IF MR. MOSIER GIVES ME THIS LANGUAGE, WE WILL TAKE A
6 LOOK AT IT. WHAT HAPPENED BEFORE WAS, WHAT HE WAS LOOKING FOR
7 WAS SOMETHING JUST TO WIPE OUT ALL OF THE MODIFICATIONS THE
8 COURT HAD MADE IN THE MODIFIED ORDER. SO I WILL LOOK AT IT.

9 **THE COURT:** OKAY.

10 SO YOU WILL WRITE SOMETHING UP AND GIVE IT TO HIM IN
11 WHAT, A WEEK?

12 **MR. MOSIER:** I'M GOING TO BE IN DEPOSITIONS ALL NEXT
13 WEEK.

14 **THE COURT:** TWO WEEKS?

15 **MR. MOSIER:** CERTAINLY WITHIN TWO WEEKS.

16 **THE COURT:** OKAY.

17 AND YOU WILL GET BACK TO HIM A WEEK AFTER THAT WITH
18 THE THINGS THAT YOU COULD LIVE WITH?

19 **MR. FOSTER:** YES, YOUR HONOR.

20 **MR. BALLARD:** THIS IS DAN BALLARD FOR PLAINTIFF.

21 CAN I JUMP IN HERE JUST FOR A SECOND? I'VE GOT A
22 SUGGESTION.

23 **THE COURT:** OKAY.

24 **MR. BALLARD:** IT'S SOMETHING EVERYBODY IS BEING
25 CREATIVE HERE ABOUT WHAT TO DO. I HAD A SUGGESTION.

1 IF DEFENDANTS ADMIT LIABILITY AND THE ONLY ISSUE IS
2 CHARACTERIZING THOSE FOUR SUBSETS OF REMEDIES, THEN PERHAPS WE
3 CAN JUST HAVE BRIEFING ON THE REMEDIES?

4 **MR. FOSTER:** WE DON'T ADMIT LIABILITY. QUITE THE
5 CONTRARY. BUT WE SAID IT'S JUST NOT WORTH THE MONEY. WE ARE
6 WILLING TO GO WITH NB SOLAR MOVING FORWARD. WE HAVE ALREADY
7 DONE THAT.

8 **THE COURT:** YEAH. THE POINT IS THEY HAVE AGREED TO
9 A PERMANENT INJUNCTION OF ONE FORM OR ANOTHER. IF YOU CAN
10 AGREE ON WHAT IT SHOULD SAY, THEN YOU WOULDN'T HAVE TO FIGHT
11 ABOUT WHAT IT SHOULD SAY.

12 YOU WOULD HAVE TO SETTLE THE ISSUE OF ATTORNEYS'
13 FEES AND DAMAGES AND THE WEBSITE. AND IF YOU COULDN'T SETTLE
14 THOSE, THEN YOU WOULD HAVE TO TRY WHETHER THOSE THINGS --
15 BECAUSE LIKE HE SAYS, HE'S NOT ADMITTING LIABILITY, HE'S JUST
16 AGREEING TO THE INJUNCTIVE RELIEF THAT YOU WANT.

17 SO THE OTHER THINGS ARE GOING TO HAVE TO EITHER BE
18 SETTLED OR TRIED.

19 **MR. BALLARD:** THANK YOU, YOUR HONOR.

20 **MR. FOSTER:** THANK YOU, YOUR HONOR.

21 **THE COURT:** OKAY.

22 **MR. MOSIER:** THANK YOU, YOUR HONOR.

23 **THE COURT:** MEANWHILE, WHAT HAVE YOU GOT -- YOU'VE
24 GOT A DATE FOR SOMETHING COMING --

25 **THE CLERK:** FURTHER CASE MANAGEMENT AND DISPOSITIVE

1 MOTION, PRETRIAL, AND COURT TRIAL DATES ALL SET.

2 **THE COURT:** WHEN IS THE DISPOSITIVE MOTION CUTOFF?

3 **THE CLERK:** THE HEARING DATE IS AUGUST 30TH.

4 **THE COURT:** OKAY.

5 WELL, IF YOU WANT TO TRY AND DO IT WITHOUT A
6 DISPOSITIVE MOTION, YOU SHOULD GET THIS LITTLE BACK AND FORTH
7 THING ABOUT THE PRELIMINARY INJUNCTION DONE QUITE SOON.
8 BECAUSE YOUR BRIEF IS GOING TO BE DUE SOON.

9 IF YOU ARE MAKING PROGRESS, YOU COULD PUT THAT DATE
10 OVER BECAUSE IT'S GOING TO COST YOU A LOT OF MONEY, I PRESUME,
11 TO WRITE UP ALL THESE SUMMARY JUDGMENT MOTIONS. IF YOU THINK
12 YOU MIGHT BE ABLE TO AVOID THAT, YOU MIGHT PUT IT OVER.

13 WHY DON'T I REFER YOU TO A MAGISTRATE JUDGE ALSO?
14 ALTHOUGH I WOULD LIKE YOU TO TRY THIS RED-LINING EXERCISE
15 FIRST, BUT I WILL REFER YOU TO A MAGISTRATE JUDGE FOR A
16 SETTLEMENT CONFERENCE TO BE HELD, I GUESS, AS SOON AS WE CAN
17 FIT ONE IN. AND WE WILL LET YOU KNOW WHO THAT IS. AND YOU CAN
18 CONTACT THAT PERSON AND SET UP A DATE.

19 **MR. FOSTER:** THAT'S FINE. THIS MAY BE A SILLY
20 SUGGESTION, BUT WITH THE CLIENT IN FROM CHINA NEXT WEEK, IS
21 THAT TOO SOON TO HAVE A SETTLEMENT CONFERENCE?

22 **THE COURT:** IT'S PROBABLY TOO SOON TO GET ON
23 ANYBODY'S CALENDAR UNLESS THEY HAD AN OPENING.

24 YOU COULD GO TO YOUR GUY. YOU MIGHT CALL YOUR GUY.
25 I AM SORRY NOT TO SAY HIS NAME, BUT I DON'T -- IT JUST GOES IN

1 ONE EAR AND OUT THE OTHER.

2 PEOPLE WHO ARE GETTING PAID BY THE HOUR TEND TO BE
3 MORE AVAILABLE.

4 **MR. FOSTER:** WE WILL NOT MENTION TO HIM, YOUR HONOR,
5 THAT YOU HAD NEVER HEARD OF HIM. HE SAYS HE'S DONE 3,000
6 MEDIATIONS.

7 **THE COURT:** OKAY. I PROBABLY HAVE, IT'S HARD TO
8 REMEMBER.

9 BUT, ANYWAY, I THINK THAT WOULD BE A GOOD IDEA.
10 CALL HIM AND SEE IF YOU CAN'T SET UP SOMETHING WHILE THE CLIENT
11 IS HERE. YOU CAN TALK ABOUT ALL THESE ISSUES.

12 **MR. MOSIER:** YOUR HONOR, THE LAST MATTER I JUST
13 WANTED TO REQUEST BRIEFLY IS THE ATTORNEYS' FEES ASSOCIATED
14 WITH THE BRINGING OF THE CONTEMPT MOTION. WE WOULD ASK THAT
15 THEY BE INCLUDED.

16 **THE COURT:** HAVE YOU SUBMITTED A DECLARATION ABOUT
17 WHAT THEY ARE AND ALL?

18 **MR. MOSIER:** NO.

19 **THE COURT:** OKAY. I WILL THINK ABOUT THAT AND I
20 WILL ISSUE AN ORDER.

21 I DON'T WANT YOU TO SUBMIT YOUR FEES IF I AM NOT
22 GOING TO AWARD THEM BECAUSE THAT WOULD BE A WASTE OF TIME. LET
23 ME PUT OUT AN ORDER WHETHER I AM GOING TO OR NOT -- OR MAYBE
24 BETTER YET WHAT I WILL DO IS, I AM GOING TO TAKE THAT UNDER
25 SUBMISSION PENDING SEEING IF YOU CAN'T SETTLE THE CASE AS A

1 WHOLE.

2 IF YOU CAN'T, I WILL CONSIDER ATTORNEYS' FEES ON THE
3 CONTEMPT MOTION.

4 **MR. MOSIER:** THANK YOU, YOUR HONOR.

5 **MR. FOSTER:** THANK YOU.

6
7 **THE COURT:** THANK YOU.

8 (PROCEEDINGS CONCLUDED AT 3:20 P.M.)
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CERTIFICATE OF REPORTER

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FRIDAY, JUNE 29, 2012